BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JULIAN ROAN Claimant VS. **KAN-PAK, LLC.** Respondent AND **STANDARD FIRE INS. CO. and TRAVELERS INDEMNITY CO. OF AMERICA** Insurance Carriers	)	Docket No. 1,046,250

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the August 25, 2011, preliminary hearing Order entered by Administrative Law Judge John D. Clark. James B. Zongker, of Wichita, Kansas, appeared for claimant.[1] William L. Townsley, III, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) held that Dr. Jeanette Salone will continue to be claimant's authorized treating physician, along with her referrals.

ISSUES

Respondent requests review of the ALJ's order continuing Dr. Salone as claimant's authorized treating physician. Respondent argues that claimant suffered an intervening injury and his current need for medical treatment is a result of that intervening injury.

Claimant asks that the ALJ's Order be affirmed, arguing the boating incident did not cause him any additional problems and he is still having the same problems he was having

[1] The ALJ misidentified claimant's attorney in his preliminary hearing Order as Charles Hess.

before then. Claimant also asks that the Board disregard the affidavits submitted in this case because they constitute double hearsay.

The issue for the Board's review is: Is claimant's current need for medical treatment the result of an intervening injury?

FINDINGS OF FACT

This is the second appeal from a preliminary hearing in this case. Previously, this Board Member held that claimant sustained personal injury by accident on March 6, 2009, that arose out of and in the course of his employment with respondent and that he gave timely notice of his accident.[2] Respondent now contends claimant sustained an intervening injury and that claimant's need for medical treatment is a result of that intervening injury.

On April 9, 2009, Dr. John Gorecki performed surgery on claimant for his work-related low back condition. Claimant testified that after his surgery in April 2009, he continued to have problems and made that known to his employer. He was released to return to work on June 16, 2009, with restrictions to avoid bending, no lifting from the floor, and a 25-pound restriction on lifting from a tabletop. Claimant was referred to Dr. Jonathan Morgan, who treated him until the doctor left town. Claimant began seeing Dr. Jeanette Salone as his authorized treating physician for pain management in January 2011.

Claimant testified that before Dr. Morgan left town, he had recommended claimant have surgery. Dr. Morgan's records, however, indicate that he would send claimant to Dr. Jon Parks for epidural steroid injections and if conservative therapy failed, surgery would be considered. Claimant said he received injections in his back, which did not help. Dr. Salone recommended claimant have physical therapy. After a preliminary hearing on December 14, 2010, the ALJ authorized conservative treatment. Claimant said he underwent conservative treatment with Dr. Salone as ordered. Dr. Salone's records indicate that he missed several physical therapy sessions because he was going on a cruise[3] and because he needed money for gasoline to get to physical therapy. He also missed an appointment with Dr. Salone on March 21, 2011. Dr. Salone cancelled his physical therapy because he only appeared for his initial visit. When Dr. Salone next saw claimant on April 5, 2011, she initiated physical therapy again and gave him a prescription for Lortab.

Claimant testified that on June 2, 2011, he went to work, and his pain was worse. Nevertheless, he went boating with two coworkers that night. He said he was out on the

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[2] *Roan v. Kan-Pak, LLC.*, No. 1,046,250, 2009 WL 4674084 (Kan. WCAB Nov. 16, 2009).

[3] Claimant denied missing physical therapy because of going on a cruise but said he told someone that.

boat for an hour to an hour and a half, and during part of that time he was tubing. Claimant denied he fell off the tube.

The next day, claimant called Dr. Salone's office and said he could not get out of bed because of severe pain. He testified he had run out of pain medication and called Dr. Salone to let her know. Dr. Salone provided him with an off-work slip and renewed his prescription for pain medication. He testified that once he took the pain medication, the pain in his low back returned to the level it had been before he went boating. Claimant testified that in his opinion, the boating incident did not cause him any additional problems that stayed with him. He said all the problems he is having now are the same ones he was having before he went boating. He has pain in his low back going down his right leg. He said that if he does any bending, stooping, lifting or twisting at work, he causes his back to throb more and the pain goes down his right leg.

Claimant saw Dr. Salone on June 7, 2011, but he did not report pain in either leg at that visit. Dr. Salone's diagnosis of failed back syndrome and chronic back strain remained the same. She noted there was no neurological evidence of a herniated disk but said a significant event may have occurred on June 3, 2011.

Respondent offered, without objection, two affidavits. In Troy Malone's affidavit, he indicated that claimant was one of the employees he supervised. He stated that after claimant missed work on June 3, 2011, he learned that claimant had been involved in a knee-boarding or tubing accident while boating on the evening of June 2, 2011. Mr. Malone also indicated that claimant confirmed to him that he was boating the evening of June 2.

In the affidavit of Dennis McDade, he indicated he is one of claimant's supervisors. He stated that his stepson, Justin McCarville, told him he was driving his boat with claimant and another coworker on June 2, 2011, when claimant "wiped" out while either tubing or knee boarding.

PRINCIPLES OF LAW

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[4] It is not compensable, however, where the worsening or new injury would

[4] *Jackson v. Stevens Well Service*, 208 Kan. 637, 643, 493 P.2d 264 (1972).

have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.[5]

In *Logsdon*,[6] the Kansas Court of Appeals held:

> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

Where respondent is asserting an intervening injury, it is respondent's burden to prove that the intervening injury was the cause of claimant's need for medical treatment rather than the work-related injuries.[7]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[9]

ANALYSIS AND CONCLUSION

Claimant continued to have pain and discomfort in his back following his surgery in April 2009. Undergoing another surgery was discussed, but first Dr. Morgan wanted claimant to undergo conservative pain management, including epidural steroid injections. That treatment was not successful, and claimant was referred to Dr. Salone for additional pain management. She began treating claimant in January 2011 and diagnosed a failed back syndrome. Dr. Salone recorded claimant's symptoms as pain "starting at about the L1 area and extending to the lumbosacral junction with pain radiating down the back of

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[5] *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997); *Stockman v. Goodyear Tire & Rubber Co.,* 211 Kan. 260, 505 P.2d 697 (1973). See also *Bradford v. Boeing Military Airplanes,* 22 Kan. App. 2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1082 (1996).

[6] *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, Syl. ¶ 3, 128 P.3d 430 (2006).

[7] See *Desautel v. Mobile Manor Inc.*, Nos. 262,971 & 262,972, 2002 WL 31103972 (Kan. WCAB Aug. 29, 2002), *cf. Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 4, 59 P.3d 352 (2002).

[8] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[9] K.S.A. 2010 Supp. 44-555c(k).

both thighs."[10] She referred claimant for physical therapy. Claimant was less than reliable in attending his appointments with the physical therapist and with Dr. Salone. Nevertheless, Dr. Salone continued treating claimant and even prescribed Lortab for pain in April 2011. Claimant was still working for respondent. He worked on June 2, and that evening he went boating with two coworkers. Claimant admits he was tubing but denies he "wiped out." The next day claimant's symptoms were worse. The location of claimant's symptoms had not changed, but they were more severe. But after taking his pain medications, claimant said his symptoms returned to the level he was experiencing before going boating.

The affidavits of Mr. Malone and Mr. McDade indicate claimant "wiped out" while boating. These two men were not present at the lake but said they heard this account from others. Because these affiants were not testifying to facts known to them and were not subjected to cross-examination, their testimony by affidavit is given little weight. The record is devoid of any expert medical opinion testimony relating claimant's current condition to the tubing. Based on the record presented to date, this Board Member finds claimant's current back condition is the result of his March 6, 2009, work related accident. Claimant suffered a temporary aggravation of his symptoms from tubing on June 2, 2011, but his condition has returned to its pre-tubing condition.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated August 25, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2011.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: James B. Zongker, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

[10] R.H. Trans. (Aug. 25, 2011), Resp. Ex. 3 at 1.